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Courtney Megan Cahill

*Florida State University College of Law*

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## RHETORICAL ATAVISM AND THE NARRATIVE OF PROGRESS IN THE DEBATE OVER MARRIAGE EQUALITY

COURTNEY MEGAN CAHILL

*Progress, far from consisting in change, depends on retentiveness . . . Those who cannot remember the past are condemned to repeat it.*

—George Santayana,  
*The Life of Reason*<sup>1</sup>

A recurring theme in the legal discourse surrounding the same-sex marriage question is that of the quest: Same-sex couples specifically, and sexual minorities more generally, are ‘on their way’ (or ‘on the path’) to becoming citizens in the most robust sense of that term. If *Lawrence v. Texas*<sup>2</sup> marked the moment in time when certain sexual minorities at last shed the final vestiges of their criminal outlaw status, then same-sex marriage will arguably mark an even more significant moment in time when sexual minorities will have at last embraced the full incidents of citizenship—the moment when they will have, quite literally, achieved full in-law status. The right to marry, under this view, is not only a necessary condition of citizenship, but also the holy grail of the gay rights movement—a veritable magic chalice imbued with the power to heal the wounds caused by decades of prejudice and discrimination and to protect its holders in the future from the same.

<sup>1</sup> George Santayana, *The Life of Reason, or The Phases of Human Progress*, vol. 1 284 (1906).

<sup>2</sup> 539 U.S. 558 (2003).

That the metaphor of the quest has emerged, often implicitly but sometimes explicitly as well, from the rhetoric surrounding the same-sex marriage question or controversy is hardly surprising. The metaphor of the quest (or the journey, pursuit, search, expedition) is but one small part of a much larger narrative of progress—a narrative of progress on which legal actors in the same-sex marriage context have in particular relied to chart just how far both marriage and sexual minorities have come in the past one hundred years (the former becoming increasingly less discriminatory and the latter increasingly less discriminated against).<sup>3</sup> Indeed, the narrative of progress is one on which legal actors in general rely to chart the extent to which the “legal system . . . obey[s] a long-term process of historical transformation—*e.g.*, from feudalism to liberal capitalism, status to contract, subordination to equality.”<sup>4</sup> Where the Latin poets and their descendents were wont to bemoan just how far we have strayed (or lapsed) from some mythical golden age,<sup>5</sup> legal actors as a general matter, and legal advocates in the same-sex marriage context in particular, are wont to invoke the quest motif and the larger narrative of progress that it betokens to celebrate just how far we have come—and, of course, just how close we are to some mythical telos or end point.<sup>6</sup>

What is surprising, however, is the extent to which the narratives of progress that have emerged from the same-sex marriage controversy are blind to a certain kind of historical repetition in that controversy. To be sure, at times, the narrative of progress that is told by jurists, commentators, and same-sex marriage advocates is punctured by an

3 See *infra* Part II.A.

4 Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1023 (1997). Literary critic, Northrop Frye, refers to progress narratives as “progress myths,” which, he explains, “come into all the phony history that people use when they say that someone is a ‘Puritan,’ meaning that he’s a prude, or that someone else is ‘medieval’ or ‘mid-Victorian,’ meaning that he’s old-fashioned. The effect of such words is to give the impression that all past history was a kind of bad dream, which in these enlightened days we’ve shaken off”). NORTHROP FRYE, *THE EDUCATED IMAGINATION* 145 (1964).

5 FRYE, *supra* note 4, at 144 (describing the “mythology about the ‘good old days,’ when everything was simpler and more leisurely and everybody was much closer to nature and got their milk out of cows instead of out of bottles. Literary critics call these reveries pastoral myths . . .”).

6 But see Gordon, *supra* note 4, at 1023 (observing that legal actors sometimes invoke “narratives of recovery” to explain the relationship between the past and the present, a narrative which is “often accompanied by a jeremiad lamenting recent lapses and corruptions” and “in which the legal system is seen as ready to be guided to recover the purity of its original principles”).

explicit acknowledgement that history is repeating itself rather than properly progressing in the sense of getting better, that is, in the sense of “purging or shedding the bad parts” of the past.<sup>7</sup> Many advocates, for example, have argued that a legal regime that allows same-sex couples to enter into civil unions but not marriage represents an instance of “separate but equal”—and that doctrine’s infamous spokesperson, *Plessy v. Ferguson*—redux.<sup>8</sup> In acknowledging the structural similarities between the Jim Crow laws that once discriminated on the basis of race and the same-sex marriage prohibitions that currently discriminate on the basis of sexual orientation, and in highlighting the common denominator that draws these two sets of laws within the same doctrinal ambit, these advocates have surely engaged history “critically” by “reveal[ing] traces of” the ‘bad parts of history’ in the present.”<sup>9</sup>

Less commonly acknowledged by jurists, commentators, and advocates who have embraced a narrative of progress in the same-sex marriage context is the extent to which the “bad parts of history” are repeating themselves or resurfacing not just on a structural and doctrinal level, but also, and more elementally, on a *rhetorical* level—a rhetorical resurfacing, or what I call a “rhetorical atavism,” that is the subject of this paper.<sup>10</sup> More specifically, those who oppose same-sex marriage, and support a legislative or constitutional ban prohibiting the same, have invoked the metaphors of the slippery slope and the counterfeit to support their position. They have argued, for instance, that same-sex

7 *d.* at 1024.

8 See, e.g., David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When it Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL’Y REV. 73, 74 (2005).

9 Gordon, *supra* note 4, at 1028 (stating that “a critical historicism reveals traces of [the bad parts of history] continuing pervasively into the present”).

10 In biology, atavism is the “[r]ecurrence of the disease or constitutional symptoms of an ancestor after the intermission of one or more generations.” OXFORD ENGLISH DICTIONARY, entry for “atavism.” Rhetorical atavism might be defined as the reappearance in legal rhetoric of a more primitive rhetorical trait or stereotype after a period of absence. Some jurists and commentators have already observed the atavistic or episodic character of discrimination against sexual minorities. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 699 (2000) (Stevens, J., dissenting) (stating that “[u]nfavorable opinions about homosexuals ‘have ancient roots,’” and “[l]ike equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine”) (citations omitted); Edward L. Tulin, Note, *Where Everything Old is New Again—Enduring Episodic Discrimination Against Homosexual Persons*, 84 TEX. L. REV. 1587, 1587 (2006) (stating that “[c]urrent legal treatment of homosexuals is best understood as a new episode of discrimination, in which old paradigms combine and coalesce in novel ways”).



marriage will lead to incest, polygamy, bestiality, necrophilia and other disgust-provoking relationships, and that same-sex marriage is a counterfeit or fraud.<sup>11</sup> Moreover, this particular anti-gay rhetoric is not 'just' rhetorical, so to speak, but rather subtly shapes and influences the law, as this paper will show. As to be expected, the typical liberal or progressive response to such rhetorical claims is outright dismissal: 'Is it not absurd to think that same-sex marriage will lead to incest or that same-sex marriage is a kind of fraud? Clearly same-sex marriage opponents are pulling these claims out of thin air as a last-ditch effort to 'save' the institution of marriage.'<sup>12</sup>

However absurd, not only are these particular rhetorical claims both intuitively appealing and influential in driving the law, but also, and more important here, they have a history which has long gone unnoticed. Far from emerging out of thin air, the metaphors of the slippery slope to incest (and other sexual taboos) and the counterfeit have a history, and in some instances a very long history, in the legal regulation of miscegenation and in the cultural and legal prohibition of sodomy. An examination of the episodic appearance of the sexual slippery slope and counterfeiting tropes over time in those different contexts is useful for a symposium that looks to history to understand current manifestations of subordination for at least two reasons.

First, the fact that "the bad parts" of our rhetorical history continue to rear their ugly head *in either the same or very similar way that they always have* should signal to us that a healthy dose of skepticism is warranted when we read or hear the progress narratives on which judges, commentators, and same-sex marriage advocates have tended to rely when they tell the story of, and recite the history behind, both marriage and the status of sexual minorities in American law and culture. However compelling, thinking about the state of marriage and the status of

11 I have elsewhere examined these two metaphors and their influence in driving the law in this area in greater depth. See Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393 (2007) [hereinafter, Cahill, *The Genuine Article*]; Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543 (2005) [hereinafter Cahill, *Slippery Slope Rhetoric*].

12 See, e.g., Andrew Sullivan, *Dialogues: Gay Marriage*, Slate, Mar. 21, 1997, at <http://slate.msn.com/id/3642/entry/23844> (stating that "[i]f you want to argue that a lifetime of loving, faithful commitment between two women is equivalent to incest or child abuse, then please argue it. It would make for fascinating reading. But spare us this bizarre point that no new line can be drawn in access to marriage—or else everything is up for grabs").

sexual minorities in terms of a gradual progression might render us blind to the strong gravitational pull that the past—here, a rhetorical past—has on the present. Second, the atavistic quality of the subordinating rhetoric here surveyed suggests that such rhetoric will resurface again in another context. If past is indeed prologue, then it is not so much a question of whether certain subordinating rhetoric will suddenly vanish with same-sex marriage, but rather of where that rhetoric will surface again and against which groups—including, but not limited to, sexual minorities—it will be deployed.

This paper will proceed as follows. Part II will provide some examples of what I have here referred to as the narratives of progress that have emerged from the legal debate over same-sex marriage. Part III will then show how an examination of the history behind current anti-gay discourse highlights the atavistic character of that discourse—a rhetorical atavism which, in turn, invites us to look more skeptically upon the narratives of progress surveyed in Part II. Part IV, which turns from the past and the present surveyed in Parts II and III to the future, will provide some suggestions for how an examination of the history behind contemporary rhetorical deployments in the same-sex marriage context is useful for crafting strategies for legal change moving forward.

## II. THE SAME-SEX MARRIAGE QUESTION AND NARRATIVES OF PROGRESS

The legal discourse surrounding the same-sex marriage question has generated a number of discrete narratives of progress that overlap or intersect with each other in the following way: They all embrace and apply a progressive model of history to constitutional law, marriage, and the status of sexual minorities under American law. As with most progressive narratives, this progressive model assumes that each of the aforementioned areas has only progressed, advanced, evolved, and improved over time. Moreover, this progressive model often assumes that same-sex marriage will mark a significant step forward for marriage as well as for sexual minorities, as each will be made more whole, so to speak, through the legal recognition of that relationship. Section A will provide a brief overview of some of those narratives of progress as they have variously appeared in cases where courts have considered the constitutionality of same-sex marriage prohibitions and in selected briefs filed either by, or on behalf of, same-sex-couple plaintiffs in

recent marriage equality litigation. Section B will then briefly consider how we might challenge those narratives of progress.

### *A. Narratives of Progress*

Given our tendency as humans to read our own life experience in terms of a narrative of progress, it is no surprise that a range of legal actors in the same-sex marriage context have invoked a similar model when telling the story (or history) behind the key players in that debate—law, marriage, and sexual minorities. Sometimes, it is a story about the evolution of constitutional law. At other times, it is a story about the evolution of marriage. And at still other times, it is a story about the evolution of sexual minorities. Whatever its focus, the model of progress on which each story relies both reflects and reproduces a similar trajectory: While things used to be bad they have only gotten better, and in the fullness of time they will surely be great.

The first narrative of progress here considered is the one which assumes that constitutional law, and therefore the Constitution itself, has evolved over time to become an increasingly more representative and more capacious body of law. For instance, in *Goodridge v. Department of Public Health*, the majority opinion, quoting from Justice Ginsburg's majority opinion in *United States v. Virginia*, stated that "[t]he history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded.'"<sup>13</sup> Similarly, the plaintiffs in Connecticut's marriage equality case, *Kerrigan v. Connecticut*, introduced their brief to the state superior court with that same quotation, noting that "[a] prime part of the history of our Constitution . . . is the story" of this "extension" of constitutional "rights and protections" to formerly disenfranchised individuals.<sup>14</sup> Under this view, constitutional "history" is itself a narrative or "story," one that charts the increasingly progressive character or aspect of the Constitution.

The second narrative of progress here considered is the one which assumes that marriage has evolved over time to become an increasingly more democratic, pluralistic, and inclusive institution. The *Goodridge* majority opinion, for instance, is largely structured around a story about the evolution of marriage, from a time when "no lawful marriage

13 *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 966 (Mass. 2003) (quoting *United States v. Virginia*, 518 U.S. 515, 557 (1996)).

14 Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 3, *Kerrigan v. Connecticut*, No. NNH-CV 04-4001813 (July 28, 2005) (citation omitted).



was possible between white and black Americans"<sup>15</sup> and when "[t]he common law was exceptionally harsh toward women who became wives,"<sup>16</sup> the latter of whom once resembled the "condition of a slave,"<sup>17</sup> to a time when "both the courts and the Legislature . . . acted to ameliorate the harshness of the common-law regime."<sup>18</sup> Under this view, marriage is no less progressive—or, in the court's words, no less an "evolving paradigm"<sup>19</sup>—than are the Constitution and the story behind it.

The *Goodridge* court's progressive marital vision serves two purposes. First, and more obvious, by highlighting the extent to which marriage has evolved throughout history (and come out strong in the end), the court is answering to marriage traditionalists' fears that same-sex marriage will signal the end of the institution of marriage; indeed, if "[m]arriage has survived all of these transformations,"<sup>20</sup> the court observes, then surely it can weather same-sex marriage. Second, and more subtle, by situating the historical transformation of marriage within a narrative of gradual (and seemingly inevitable) progress, the *Goodridge* court at least suggests that same-sex marriage is merely the next, and perhaps even inexorable, step in that progression. Put differently, by talking about marriage in progressive terms, the *Goodridge* court makes same-sex marriage appear to be far less radical than its critics say that it is.

The *Goodridge* court is surely not alone in situating marriage within a larger progressive narrative. Recently, a trial court in Iowa found that that state's same-sex marriage prohibition violated state constitutional equality and liberty guarantees. The court in that case, *Varnum, v. Brien*, began its discussion about the "changing nature and meaning of marriage" by remarking that "[m]arriage has evolved over time, in legislatures and courts, to meet the changing needs of American society and to embody fuller notions of consent and personal choice."<sup>21</sup> The *Varnum* court went on to chart the radical transformation of marriage over time both in Iowa and in the United States more generally; it observed that "[m]arriage in the United States is virtually unrecognizable from its earlier common law counterpart, having undergone

15 *Goodridge*, 798 N.E.2d at 958.

16 *Id.* at 967.

17 *d.* (quotations and citation omitted).

18 *Id.*

19 *d.* at 966-67 (stating that "[a]s a public institution and a right of fundamental importance, civil marriage is an evolving paradigm").

20 *Id.* at 967.

21 Ruling on Plaintiffs' and Defendant's Motion for Summary Judgment at 37, *Varnum v. Brien*, Case No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007).



radical, unthinkable changes in laws governing who may marry, when marriages may end, and the legal significance and consequences of marriage for the individuals involved."<sup>22</sup>

Like *Goodridge*, *Varnum* tells the story of the progressive advancement of marriage over the last three-hundred years, from a time when "[m]arried women were essentially chattel"<sup>23</sup> and "[s]laves . . . could not . . . legally marry,"<sup>24</sup> to the time when Iowa finally repealed its anti-miscegenation law (the third state to do so) and started to institute "fundamental" and "remarkable changes in marriage"<sup>25</sup> that would change its face forever—changes like no-fault divorce and "the removal of criminal restrictions on extramarital and non-procreative sexual activities."<sup>26</sup> The historians who filed an amicus brief in that case on behalf of the plaintiffs told a somewhat similar story, one which "chronicl[ed] the state's devotion to the principles of equality and individual liberty, as well as its courage to live up to those principles in the face of popular prejudice."<sup>27</sup> Under their view, marriage has progressed over time (by becoming an increasingly less discriminatory institution), and Iowa has stood at the vanguard of that progression (by being among the first states to institute such radical, though necessary, changes to that institution).

The third and final narrative of progress here considered is the one which posits that sexual minorities have progressed over time in the sense of assuming their true identities and shedding the vestiges of their criminal past—a progression that will ostensibly end, or culminate, with same-sex marriage. The Supreme Court's landmark decision in *Lawrence v. Texas*, or at least the public's reaction to it, no doubt laid the groundwork for this narrative; indeed, commentators have well documented the extent to which *Lawrence* was perceived by same-sex marriage advocates and opponents alike as the "prelude" to same-sex marriage and as "an entirely new chapter in [the] fight for equality for lesbians and gay men."<sup>28</sup> In other words, *Lawrence* encouraged a way of

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 38.

<sup>25</sup> *Id.* at 39.

<sup>26</sup> *Id.*

<sup>27</sup> Brief of Amici Curiae Professors of Law and History at 1, *Varnum v. Brien*, CV 5965 (Jan. 26, 2007).

<sup>28</sup> See, e.g., Shulamit H. Shvartsman, Comment, "Romeo and Romeo": An Examination of *Limon v. Kansas* in Light of *Lawrence v. Texas*, 35 SETON HALL L. REV. 359, 360 & n.7 (2004).

thinking and talking about the status of sexual minorities in America in terms of progress—not just progress, in fact, but progress cast in narrative-like terms, *e.g.*, “prelude,” “chapter,” etc.

Courts have at times conceptualized same-sex couples’ legal struggle for the right to marry as the next—or, perhaps, the final—step in a progressive journey from outlaw to in-law status. For instance, in *Lewis v. Harris*, the New Jersey Supreme Court found that equal rights and benefits (and responsibilities) were constitutionally required under the state constitution but that the “name,” marriage, was not.<sup>29</sup> The court remarked that while its “decision today significantly advances the civil rights of gays and lesbians,” sexual minorities’ “quest does not end here.”<sup>30</sup> Rather, “[t]heir next appeal must be to their fellow citizens whose voices are heard through their popularly elected representatives.”<sup>31</sup> Similarly, in *In re Marriage Cases*, in which a California appeals court held that same-sex marriage was not constitutionally required under that state’s constitution, a concurring judge observed that “[h]aving endured the often long and difficult process of claiming their true identities, gay men and lesbians are now asking to be recognized as the equally loving and committed partners and capable family units they are, and to be afforded the same responsibilities and protections available to other families.”<sup>32</sup> While “we are being called upon to work together toward a mutual goal of liberty and justice,” the judge continued, “we must be careful about where the achievement comes from. If respect for the rule of law is to be maintained, courts must accept and abide by their limited powers.”<sup>33</sup>

Both of these courts contextualized the plaintiffs’ struggle for the right to marry in those cases within a larger narrative of progress. In *Lewis*, same-sex couples, or sexual minorities more generally, were on a “quest” for “social acceptance” and the name, marriage—a quest that was “significantly advance[d]” by the court’s decision in that case. In *In re Marriage Cases*, sexual minorities, having “claim[ed] their true identities,” were “now” poised to reach a “mutual goal of liberty and justice.” The rhetoric of “quest” and “process” invoked by these courts is reminiscent of the *Lawrence* majority opinion’s final remarks: “As the

<sup>29</sup> *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006).

<sup>30</sup> *Id.* at 223.

<sup>31</sup> *Id.*

<sup>32</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 730 (2006) (Parrilli, J., concurring), review granted and opinion superseded by *In re Marriage Cases*, 149 P.3d 737 (2006).

<sup>33</sup> *Id.*

Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."<sup>34</sup> In reading this concluding line, where the idiom of 'quests' and progression is explicit, one can easily see why the public read *Lawrence* as 'paving the way,' so to speak, to same-sex marriage,<sup>35</sup> notwithstanding the majority's suggestions to the contrary elsewhere in that case.<sup>36</sup>

This notion that sexual minorities as a class not only have 'advanced' and become more 'true' over time, but will likely achieve their 'goal' or 'quest' for equality with the right to marry, is commonplace in liberal pro-marriage commentary. Professor William Eskridge, for instance, has stated that "law's civilizing movement will not be complete until the same-sex married couple replaces the outlawed sodomite as the paradigmatic application of law to gay people."<sup>37</sup> Similarly, Evan Wolfson has suggested that the right to marry is a necessary—and perhaps even a sufficient—condition of equality and citizenship for sexual minorities.<sup>38</sup> Under these views, same-sex marriage will mark the end (or, at least, the very significant beginning of the end) of sexual minorities' quest for full inclusion and belonging.

### *B. Challenging Narratives of Progress*

The narratives of progress surveyed above represent but a small sample of the various discourses of progress that have come to pervade the rhetoric surrounding same-sex couples' struggle (or "quest") for marriage equality. Why has the quest or progress narrative had such resonance in the same-sex marriage context? For one thing, progress narratives are seductive and compelling; not only do we like to think in terms of progress, but perhaps we *naturally structure human experience*

34 539 U.S. 558, 579 (2003).

35 See, e.g., Nelson Lund and John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1556-67 (2004) (stating that "we expect to see powerful efforts to ensure that *Lawrence* [sic] paves the way for a broader attack on traditional marriage laws").

36 See, e.g., *Lawrence*, 539 U.S. at 578 (stating that "[t]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

37 William N. Eskridge, Jr., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 8 (1996).

38 Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 581 (1994-1995) (stating that withholding the right to marry from same-sex couples represents "one of the, if not the major, barriers to [gay people's] full and equal citizenship") (emphasis added).



*more generally* in terms of progress. If that is the case, then it should come as no surprise that legal actors have invoked such a narrative to structure the same-sex marriage experience as well. Moreover, in addition to being intuitively appealing, the progress narrative is also legally persuasive and strategically savvy. As I suggested above, the progress narrative—whether it be the narrative of constitutional history, marriage, or sexual minorities—pulls us blithely along in a way that makes it seem as if same-sex marriage is merely the inevitable and inexorable next step in the successive stages of marriage's (and sexual minorities') evolution.

However compelling, the narrative of progress is often blind to the extent to which history might be repeating itself in the present. For instance, the statement that “[m]arriage in the United States is virtually unrecognizable from its earlier common law counterpart,” assumes that the vestiges of coverture are no longer with us, or at the very least “virtually unrecognizable.” Many commentators would and do argue, however, that the effects of coverture are still very much an integral part of women's (and not just married women's) lived experience today. Indeed, Professor Katherine Franke has nicely suggested that some of the recent arguments made in support of same-sex marriage themselves “echo[] a longing for a kind of contemporary coverture, whereby one or both previously individuated subjects are dissolved into a joint legal and economic unit by and through the institution of marriage.”<sup>39</sup> In one marriage equality brief, plaintiffs referred to the common law regime of coverture not to contest it, but rather to emphasize just how important marriage is, and always has been, in the United States. In their words: “Marriage . . . was not only essential to the conception of human intimacy and relationships, but also played an indispensable role in social and economic ordering. The common law doctrine of coverture was central to the marriage relationship.”<sup>40</sup>

To be sure, legal actors and commentators have at times resisted the allure of reading the same-sex marriage debate in terms of a straightforward, and forward-moving, narrative of progress. For instance, and as mentioned in this paper's Introduction, some commentators have observed that a legal regime that allows same-sex couples to enter into

39 Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 246 (2006).

40 Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 24, *Kerrigan v. Connecticut*, No. NNH-CV 04-4001813 (July 28, 2005).

a civil union but not marriage is an instance of separate-but-equal and that doctrine's ignominious spokesperson, *Plessy v. Ferguson*, redux.<sup>41</sup> An interpretation such as this one, which views the present as the virtually identical incarnation or avatar of the past rather than several steps removed from it, more accurately captures what is behind a statement like that which appeared in *Kerrigan v. Connecticut*, where the court held that the state did not violate constitutional equality guarantees by withholding the name, marriage, from same-sex couples: "Though the plaintiffs may feel themselves to be relegated to a second class status, there is nothing in the text of the Connecticut statutes that can be read to place plaintiffs there."<sup>42</sup> One cannot read such a statement without seeing the ghost of *Plessy*, where the Supreme Court made not a similar, but the same, observation:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.<sup>43</sup>

At the same time, however, legal actors and commentators have overlooked the extent to which history is repeating itself in the same-sex marriage controversy not just on a doctrinal level, but also, and more elementally, on a rhetorical level. It's not just that the same doctrine has come back to haunt a different subordinated class, but that the same rhetoric that has been deployed for centuries against subordinated groups—including sexual minorities—has resurfaced in the marriage context. As with the atavistic presence of certain doctrine, the atavistic presence of certain rhetoric makes it that much more difficult to read the same-sex marriage question in strictly progressive terms. The following Part will now consider what that rhetoric is and the history behind it.

### III. THE HISTORY OF ANTI-GAY

#### (OR ANTI-SAME-SEX MARRIAGE) RHETORIC

Contemporary anti-same-sex marriage rhetoric partakes of a much older history of conceptualizing non-traditional relationships in certain

41 See, e.g., Buckel, *supra* note 8, at 74.

42 Kerrigan, 909 A.2d 89, at 97.

43 *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

rhetorical terms. While it is easy to dismiss this rhetoric—specifically, the claims that same-sex marriage will lead to incest and other disgusting horrors and that same-sex marriage is a fraud or counterfeit—as the fatuous rant of social conservatives, outright dismissal is a bad idea for two reasons: (1) first, this rhetoric has been influential in driving the laws which flow from it—laws, like same-sex marriage prohibitions, which play a critical role in the continued subordination of sexual minorities in our legal and cultural order; and (2) second, this rhetoric is merely the contemporary avatar of something that far antedates it. The fact that the same rhetoric that was once used to talk about sodomy and miscegenation has resurfaced *in the same or very similar way* in the same-sex marriage context should force us to look more skeptically upon the narratives of quest, advancement, evolution, and progress surveyed in the previous Part.

Before looking at that rhetoric and its history, however, it is useful at this point to compare the theory of rhetorical atavism put forth here to other theories of law and rhetoric that have arisen in similar contexts. Rhetorical atavism assumes that primitive rhetoric that was once deployed to justify the subordination of certain individuals and groups—racial and ethnic minorities in the nineteenth century, “sodomites” in the fourteenth—does not recede or diminish with time, but rather reappears or resurfaces *in the same or very similar form* over time. As such, it can be distinguished from other theories of law and rhetoric, including Professor Reva Siegel’s theory of “preservation through transformation”<sup>44</sup> and Professor Eskridge’s theory of “sedimentation,”<sup>45</sup> which posit that the so-called ‘bad’ rhetoric of a former era in time either morphs into, or is covered over by, something that sounds better—and that therefore makes the bad rhetoric, and the legal justifications that flow from it, harder both to detect and to challenge.

More specifically, Siegel’s theory of “preservation through transformation” posits that the rhetoric which once justified a status hierarchy will transform or morph into something else—something more modernized and innocuous ‘sounding’—once that regime is legally and socially contested; in turn, it is that very rhetorical transformation which helps to perpetuate that same status hierarchy.<sup>46</sup> For instance,

44 Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2119 (1996).

45 William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000).

46 See Siegel, *supra* note 44, at 2119 (stating that “[w]hen the legitimacy of a status



the eighteenth-century rhetoric of marital chastisement that was once deployed to justify a regime of gender hierarchy and violence within marriage over time morphed into a rhetoric of companionate marriage and family privacy once that regime was legally and socially contested—a more innocuous sounding rhetoric that made it harder to detect, and therefore easier to justify, that same regime.<sup>47</sup> Similarly, Eskridge's theory of "sedimentation" posits that 'bad' rhetoric and justifications will eventually be 'covered over' by 'better-sounding' rhetoric and justifications that appeal to more people and on a wider level. For instance, the early rhetoric of disgust that once justified why "homosexuals" were legal outlaws has over time been covered over by a more politically appealing rhetoric of values and of what he calls "no promo homo"—more palatable rhetoric that overlies, and thus never fully displaces, the older rhetorical deployments.<sup>48</sup>

Unlike those theories, rhetorical atavism posits that the same subordinating rhetoric that once justified one regime (*e.g.*, the criminalization of miscegenation and sodomy) will in time resurface *in the same or very similar form* in order to justify a different regime (*e.g.*, the prohibition of same-sex marriage). That is, whereas "preservation through transformation" and "sedimentation" assume that rhetoric undergoes transformation over time to justify (and thereby preserve) pre-existing legal regimes, rhetorical atavism assumes that the same rhetoric will appear over time, in episodic fashion, to justify different legal regimes. It recognizes that while the law might progress in any particular context—*e.g.*, we no longer have criminal anti-miscegenation and sodomy laws—the rhetoric of subordination remains the same (and largely

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regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend").

47 See *id.* (using as an example of preservation through transformation "a case study of domestic assault law as it evolved in rule structure and rationale from a law of marital prerogative to a law of marital privacy").

48 See Eskridge, *supra* note 45, at 1346 (observing that "[d]efenders of sodomy laws modernized their justifications by making medical and republican arguments, but the defenses were sedimentary, layering the new arguments onto old natural law ones"). It should be noted, however, that Eskridge's theory of sedimentation differs from Siegel's theory of preservation through transformation insofar as modernized justifications, in his view, will not invariably succeed in maintaining or preserving pre-existing status hierarchy. See *id.* at n.32 (stating that while "[i]n many ways, the gaylegal experience illustrates Reva Siegel's theories about social change," sedimentation theory and '[n]o promo homo' "also [suggest] that her thesis is too pessimistic: Modernization of justification does not necessarily rescue unjust entitlements").

unchallenged). In other words, even as we might progress in the sense of ending one form of subordination, we stay the same in the sense of never really getting beyond the rhetoric that helps to shore up that subordination in the first place. With this brief description in mind, this Part now turns to a consideration of what contemporary anti-same-sex marriage rhetoric looks like and how it is driving the law, as well as an overview of the history behind it.

### *A. Contemporary Anti-Same-Sex Marriage Rhetoric*

While contemporary anti-same-sex marriage rhetoric is manifold and diverse, marked by both more and less bizarre and outlandish claims, I focus briefly here on the two which have a history that long predates their more recent appearance on the proverbial public stage in the same-sex marriage context. As mentioned above, those two rhetorical deployments are that of (1) the slippery slope to incest and other sexual abominations, and (2) the counterfeit. Both claims, as I have elsewhere argued, are widespread, and both claims, as I have there suggested, are influential in driving the law in this area.<sup>49</sup> While slippery slopes are, of course, commonplace in legal rhetoric, my focus here is on a particular kind of slippery slope claim—namely, that of the sexual variety.

Same-sex marriage opponents routinely invoke the figure of the slope to sexual deviance in order to presage not only a world of sexual abandon, but also the end of marriage should same-sex marriage receive legal recognition. For instance, conservative commentator, Stanley Kurtz, relied on slippery-slope like logic when he argued that “[g]ay marriage would set in motion a series of threats to the ethos of monogamy from which the institution of marriage may never recover.”<sup>50</sup> Similarly, and more recently, a group of law professors who submitted an amicus brief in Rhode Island’s same-sex divorce case contended that, if Rhode Island were to recognize a marriage validly contracted in Massachusetts for the purpose of granting a divorce, even more “absurd” things could follow.<sup>51</sup> “[A] man or woman from Rhode Island might enter into a [sic] inter-species marriage in another jurisdiction

49 See, e.g., Cahill, *The Genuine Article*, *supra* note 11, *passim*; Cahill, *Slippery Slope Rhetoric*, *supra* note 11, *passim*.

50 Stanley Kurtz, *The Libertarian Question: Incest, Homosexuality, and Adultery*, National Review Online (Apr. 30, 2003), available at <http://www.nationalreview.com/kurtz/kurtz043003.asp>.

51 Brief of Amici Curiae Law Professors, et al. at 32, *Chambers v. Ormiston*, Case No. 2006-340.

(as permitted under tribal law, for instance)," and then ask the state of Rhode Island to recognize it, the brief noted.<sup>52</sup> Worse yet, the brief continued, a man or woman from Rhode Island "might marry a corpse or dead person (as reportedly allowed in France)."<sup>53</sup> As mentioned above, slippery slope arguments are an integral part of legal and political discourse, and therefore surely not unique to the same-sex marriage context.<sup>54</sup> That said, they are particularly widespread in that context because slippery slope rhetoric is particularly well-suited to triggering disgust—an intuitive emotion that goes hand-in-hand with sexual and cultural taboos like same-sex relationships and same-sex marriage.<sup>55</sup>

The metaphor of the counterfeit, no less than the metaphor of the slippery slope, has played a critical role in driving and shaping traditionalist marriage discourse. In May 2003, Marilyn Musgrave, United States Representative and co-sponsor of the original proposed Federal Marriage Amendment (FMA), publicly declared that such an amendment was necessary because "[t]he traditional values Americans hold are being traded in for counterfeit marital unions."<sup>56</sup> Since that time, same-sex marriage opponents have variously intoned that same-sex marriage is a form of "counterfeit marriage that devalue[s] traditional marriage in the same way counterfeit money devalues real money,"<sup>57</sup> that "[j]ust as counterfeit \$20 bills impact our economy . . . counterfeit [*i.e.*, same-sex] unions have an impact on our culture,"<sup>58</sup> that "[c]ounterfeit money hurts our wallets . . . [c]ounterfeit marriage will do the same to real marriage,"<sup>59</sup> that same-sex marriage "devalues the currency of marriage in the law" because "[i]t's Monopoly money—not the

52 *Id.* at 32.

53 *Id.* at 32-33; *see also id.* at n.10 & n.11 (variously observing that "[i]nterspecies marriage arguments have salted the academic debate over same-sex marriage" and that "[m]arriage to a dead person . . . is possible in jurisdictions where proxy marriages may be performed").

54 On slippery slope rhetoric in legal discourse, *see generally* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

55 *See, e.g.*, Cahill, *Slippery Slopes*, *supra* note 11, at 1577.

56 Cheryl Wetzstein, *Bill to Define Marriage Tried Again in House as Two States Mull Cases*, WASH. TIMES, May 26, 2003, at A8.

57 Arkansas Marriage Amendment Committee: A Campaign to Protect Marriage in Arkansas, *Judicial and Legal Questions*, available at <http://www.arkansasmarriage.com/static/about/faq.php>.

58 Timothy Daily, *The Slippery Slope of Same-Sex Marriage*, Family Research Council, Sept. 2005, available at <http://www.frc.org/get.cfm?i=BC04C02>.

59 Rep. Robert G. Marshall, Letter to the Editor, *No 'New Jim Crow' in Virginia*, WASH. POST July 3, 2004, at A25.



real thing,”<sup>60</sup> and that same-sex marriage amendments are necessary in order to “[p]revent the courts or other government officials from subverting [the definition of traditional marriage] by authorizing counterfeit marriage.”<sup>61</sup>

This notion that same-sex marriage is a species of fraud no doubt signals an anxiety over passing. The federal criminal statute that targets counterfeiting, 18 U.S.C. § 472, imposes penalties on those who either “pass,” or attempt to “pass,” counterfeit currency in the United States.<sup>62</sup> Thus, to call same-sex marriage a counterfeit, and to pass a law that is intended to prohibit such counterfeits, is effectively to punish same-sex couples for passing, or attempting to pass, too well.

Our first impulse, I think, upon hearing sexual slippery slope and counterfeiting rhetoric is straightway to dismiss it as ‘mere’ rhetoric—‘mere’ rhetoric, moreover, that seems to come out of nowhere and that represents an absurdly desperate attempt on the part of reactionaries to save traditional marriage from sexual deviance and fraud. Such outright dismissal, however, fails to recognize that this rhetoric has a well-documented history, one which I will survey below. Moreover, such outright dismissal overlooks the extent to which sexual slippery slope and counterfeiting rhetoric has been influential in driving the law in this area in both more and less explicit ways, an influence that I would like briefly to address.

First, and with respect to the influence of slippery slope rhetoric on the law surrounding marriage, courts that have recently upheld same-sex marriage prohibitions have engaged in slippery-slope like reasoning—even if they have not overtly invoked the actual figure of the slope. For instance, in *Conaway v. Deane*, the Maryland Court of Appeals, the highest court in that state, dismissed the plaintiffs’ fundamental right to marry argument on the ground that such a right “was not absolute.”<sup>63</sup> If it were, the court reasoned, then how could the plaintiffs explain the state’s prohibition of “bigamous relationships” and relationships between “[i]ndividuals within a certain degree of lineal

60 Press Release, The Christian Institute, Gay Partnerships Bill Creates Counterfeit Marriage (Oct. 24, 2001), available at [http://www.christian.org.uk/pressreleases/2001/october\\_24\\_2001.htm](http://www.christian.org.uk/pressreleases/2001/october_24_2001.htm).

61 *Utah Marriage Amendment Deserves Support*, available at <http://www.marriagedebate.com/2004/09utah-marriage-amendment-deserves.htm>, (Sept. 7, 2004, 16:03 EST).

62 18 U.S.C. § 472 (2000).

63 *Conaway v. Deane*, 923 A.2d 571, 623 (Md. 2007).

or collateral consanguinity"?<sup>64</sup> While certainly less incendiary than the slippery slope claim that same-sex marriage will inevitably beget bigamy and incest, the *Deane* court's justification for why the right to marry is relative rather than absolute merely represents a kinder, gentler way of saying the same. Similarly, the New Jersey Supreme Court's statement in *Lewis v. Harris* that legal recognition of same-sex marriage (as opposed to a marriage-equivalent, such as civil unions) would represent the "overthrow of the long established definition of marriage" and would "render a profound change in the public consciousness of a social institution of ancient origin,"<sup>65</sup> sounds strikingly similar to Mr. Kurtz's claim that same-sex marriage would lead us headlong into the end or "destruction" of traditional marriage.

Second, and with respect to the influence of counterfeiting rhetoric on the law surrounding marriage, many of the same-sex marriage amendments that have been passed in more than half the states over the last four years literally embody the concept of 'same-sex relationships as fraud.' While these amendments, unlike the policy rhetoric that gave rise to them, do not explicitly contain the language of counterfeit, they do explicitly conceptualize same-sex relationships—and unmarried relationships more generally—as approximations or imitations of the real thing. For instance, Ohio's amendment prohibits the state from recognizing "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."<sup>66</sup> In *City of Cleveland v. Knipp*, an Ohio court explained that the purpose of that amendment was to "define[s] marriage" and to identify it "as having a unique place in our society and protects it from any counterfeits."<sup>67</sup> Similarly, Wisconsin's amendment prohibits the state from recognizing "[a] legal status identical or substantially similar to that of marriage for unmarried individuals."<sup>68</sup> One hears echoes of fraud and counterfeit in both of these amendments, which legally prohibit that which "approximate[s]," or that which is "identical or substantially similar to," traditional marriage. As with the appearance of slippery-slope like reasoning in recent decisional law,

64 *Id.*

65 *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006) (emphasis added).

66 Ohio CONST. art. XV, § 11.

67 *State v. Knipp*, No. 2004 CRB 039103, 2005 WL 1017620, at \*4 (Ohio Mun. Ct. Mar. 10, 2005 (quoting the Ohio Campaign to Protect Marriage website, [www.ohiomarriage.com/legal\\_issues\\_&\\_news.shtml](http://www.ohiomarriage.com/legal_issues_&_news.shtml))).

68 Wis. CONST. art. XIII, § 13.

the appearance of counterfeit-like language in the state constitutional amendments which have swept the nation throws into relief just how influential 'mere' rhetoric has been in driving the law in this area.

Indeed, one might even say that the rhetoric of slippery slopes and counterfeit has influenced not only the law surrounding same-sex marriage, but also the kinds of arguments that same-sex marriage advocates and plaintiffs are making in same-sex marriage litigation. Some advocates, for instance, have employed a kind of slippery slope claim when arguing why same-sex marriage prohibitions are *unconstitutional*. For instance, a brief filed this past April by the city of San Francisco in California's marriage equality case contended that the state *must* extend the right to marry to same-sex couples because it already extends that right to all sorts of unsavory characters, including sex offenders.<sup>69</sup> We might read this statement and others like it, as I have done elsewhere, as a kind of reverse slippery slope, that is, an argument that same-sex marriage necessarily flows (or at least should necessarily flow) from the legal recognition of something *worse*.<sup>70</sup>

Similarly, many plaintiffs in recent marriage equality litigation have testified that without marriage they feel 'less real' or even 'unreal.'<sup>71</sup> One plaintiff, for instance, testified that the state's refusal to grant the name "marriage" to same-sex couples "discount[ed] and cheapen[ed]" her relationship with her partner.<sup>72</sup> This plaintiff seemed to internalize the counterfeit metaphor, if only to invert it, by suggesting that a relationship *without* the label "marriage" was somehow less real and *less valuable* than one with it. This is all just to say that slippery slope and counterfeiting rhetoric has played an influential role in driving not just

69 Petitioner City and County of San Francisco's Opening Brief on the Merits at 2, *In re Marriage Cases* (Case No. S147999), available at <http://www.sfgov.org/site/uploadedfiles/cityattorney/SUPCT-OPENINGBRIEF.pdf> (stating that "the marriage exclusion tells lesbians and gay men that they are less worthy than child abusers, or sex offenders, or convicts in prison for murder. Because after all, those people *do* have the right to get married").

70 See Courtney Megan Cahill, "If Sex Offenders Can Marry, Then Why Not Gays and Lesbians?" *An Essay on the Progressive Comparative Argument*, BUFF. L. REV., Essays Issue (forthcoming December 2007).

71 See, e.g., *In re Marriage Cases*, 49 Cal. Rptr.3d 675, 760 n.22 (Cal. App. 1<sup>st</sup> Dist. 2006) (Kline, J., dissenting) (citing affidavits submitted to the trial court in which plaintiffs testified, among other things, that "[i]n the eyes of the law and of much of society, our commitment and our union, to each other and to our families, is not legitimate and not real").

72 Aff. of Karen Nicholson-McFadden, dated September 17, 2003, PP 12, 13, *Lewis v. Harris*, 2003 WL 23191114 (N.J. Sup. Ct. 2003) (No. MER-L-15-03).



law, but also the style and substance of legal arguments made by those who support and seek same-sex marriage.

### *B. The History of Anti-Same-Sex Marriage Rhetoric*

Section A set forth in brief the two varieties of anti-same-sex marriage rhetoric here under consideration, and challenged the claim that such rhetoric is merely rhetorical. This Section now challenges the claim that such rhetoric comes out of nowhere by showing that it has a history, and in some instances a very long history, in the legal regulation and cultural prohibition of miscegenation and sodomy. Subsection 1 will first examine the history behind the rhetorical deployment of the slippery slope in those contexts. Subsection 2 will then examine the history behind the rhetorical deployment of the counterfeit in those same contexts. Part IV will finally consider what this rhetorical history tells us about the narratives of progress surveyed in Part II, as well as the ways that advocates might put that history to productive use in marriage equality litigation.

#### 1. The History of the Slippery Slope Metaphor

As mentioned above, the sexual slippery slope has a way of rearing its head in the law whenever the law is confronted with tabooed intimate relationships and practices. The slippery slope to polygamy and incest in particular did not suddenly appear on the scene with same-sex relationships, but rather first surfaced in mid-nineteenth-century America as a response to that century's paradigmatic sexual taboo, miscegenation. For instance, in 1872, the Tennessee Supreme Court upheld a defendant's criminal indictment for violating that state's criminal anti-miscegenation statute, notwithstanding the defendant's argument that he had been validly married in Mississippi before moving to Tennessee. The *State v. Bell* court invoked the metaphor of the slippery slope to incest and polygamy in order to presage the Pandora's Box that would surely be unleashed if it were to recognize an interracial marriage validly contracted in another state:

Extending the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without

remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.<sup>73</sup>

Similarly, in 1883, the Supreme Court of Missouri upheld the indictment of a white woman who had "intermarried" with a man "having more than one-eighth part of negro blood" against a federal constitutional challenge. The *State v. Jackson* court reasoned that "the right to marry any one who is willing to wed him" was not "one of the rights attached to American citizenship." If it were, the court continued, then "all our marriage acts forbidding intermarriages between persons within certain degrees of consanguinity are void, and the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother."<sup>74</sup>

Finally, if incest was the relationship that miscegenation would inevitably lead to in *Bell* and *Jackson*, it was something that was *like* miscegenation in *Eggers v. Olson*.<sup>75</sup> In that case, decided in 1924, the Oklahoma Supreme Court stated not only that it would be a "fraud upon the laws of [the] state [of Oklahoma]" if the court were to recognize interracial marriage, but also that "the inhibition [against miscegenation], like the incestuous marriage, is in the blood, and the reason for it is stronger still."<sup>76</sup> By observing that the taboo against miscegenation was even *greater than* the taboo against incest ("the reason for it is stronger still"), the *Eggers* court at least implied that the legal recognition of the greater taboo might logically compel the legal recognition of the lesser one. In addition, the court characterized state-sanctioned miscegenation in terms that curiously prefigure the counterfeiting trope discussed below, namely, as a variety of "fraud."

The examples of slippery slope rhetoric in the miscegenation context here provided represent but a small sample of the common tendency during this period to talk about one sexual taboo, miscegenation, in terms of other sexual taboos generally and in terms of the *incest* taboo specifically. Elsewhere, I have shown that those who supported civil and criminal anti-miscegenation statutes routinely collapsed the taboo against miscegenation into the taboo against incest, each of which constituted a 'blood' violation and each of which was

73 *State v. Bell*, 66 Tenn. 9, 9 (1872). It is interesting to note that the *Bell* court here deployed a kind of reverse slippery slope: Interracial marriage is already the most "revolting" evil rather than that into which we will precipitously plunge.

74 *State v. Jackson*, 80 Mo. 175, 176 (1883).

75 *Eggers v. Olson*, 231 P. 483 (Okla. 1924).

76 *Id.* at 486.

conceptualized in terms of the other: incest was considered to be a form of "intermarriage" no less than miscegenation was considered to be a form of incest.<sup>77</sup> As Henry Hughes, white supremacist and proslavery apologist, wrote in 1852: "The same law which forbids consanguineous amalgamation forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest."<sup>78</sup> In addition, I have suggested that the reason why miscegenation and incest were so closely linked—and at times conflated—during this time was because incest was (and still is) an easy target and because incest represented (and continues to represent) a prototypical form of "boundary violation" that readily elicits disgust.<sup>79</sup> Incest was therefore strategically placed at the bottom of the slippery slope in order to trigger disgust not only against incest but also, and more important, against the relationship to which it was being compared, here, miscegenation.

If the slippery slope to incest and, occasionally, polygamy was the figure of choice for eighteenth- and early-twentieth-century courts that were considering the miscegenation question, then the slippery slope to incest, polygamy, bestiality, and a whole host of sexual and cultural taboos was the figure of choice for late-twentieth-century courts and policymakers considering the sodomy question. In *Bowers v. Hardwick*, the Supreme Court invoked the figure of the slippery slope—or, in the Court's terminology, the "road"—as a short and not-so-sweet way of expressing why it simply could not recognize a so-called "right to homosexual conduct" under the federal Constitution. As the majority there stated: "[I]t would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road."<sup>80</sup>

Similarly, and immediately prior to the Court's decision in *Lawrence v. Texas*, which overruled *Bowers* and struck down the criminal sodomy law at issue in that case, then Senator Rick Santorum invoked the metaphor of the slope in a statement for which he received public censure (and for which he refused to apologize): "If the Supreme Court says that you have the right to consensual [gay] sex within your home, then

77 See Cahill, *Slippery Slopes*, *supra* note 11, at 1590-91.

78 HENRY HUGHES, TREATISE ON SOCIOLOGY: THEORETICAL AND PRACTICAL (1852), reprinted in THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830-1860, at 259-60 (Drew Gilpin Faust ed., 1981).

79 See Cahill, *Slippery Slopes*, *supra* note 11, at 1583-88.

80 *Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986).



you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything."<sup>81</sup> Judge William Pryor, then Attorney General for the state of Alabama, made a similar argument in his *Lawrence* amicus brief, which contended that the right asserted by the petitioners in that case "must logically extend to activities like prostitution, adultery, necrophilia, bestiality, possession of child pornography, and even incest and pedophilia (if the child should credibly claim to be 'willing')." <sup>82</sup> Finally, dissenting in *Lawrence*, Justice Scalia fulminated that "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" could not "survive rational basis review" if, "as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest."<sup>83</sup>

As this brief history of slippery slope rhetoric shows, the slippery slope to incest and other sexual taboos has an atavistic quality in the sense that it has made an episodic appearance throughout time rather than dwindled, diminished, or dramatically transformed itself over time. Indeed, the *Jackson* court's statement in 1883 that the legal recognition of miscegenous marriage would inexorably lead to a situation where the "nephew [could] marry his aunt, the niece her uncle, and the son his mother or grandmother," does not sound a whole lot different from the more recent statements that sodomy would inexorably lead to "adult incest" and same-sex marriage to the same. Remarkably, then, the contemporary incarnation of the slippery slope in the same-sex marriage context retains, rather than altogether transforms, the structural and substantive features of its miscegenation and sodomy antecedents.

Admittedly, the sexual slippery slope has experienced some change over time in at least two respects. First, it has come to sound more desperate (and disgust-driven) insofar as it has come to envision ever-more-absurd (and ever-more-disgusting) sexual scenarios: from the incest and polygamy scenarios that coalesced around the miscegenation question, to the incest, polygamy, adultery, bestiality, and necrophilia scenarios that have more recently coalesced around the sodomy and same-sex marriage questions. Second, and relatedly, the sexual slippery slope has, if anything, lost persuasive traction: whereas it was wielded by the

81 Interview by the Associated Press with Sen. Rick Santorum, R-Pa. (Apr. 7, 2003).

82 Brief of the States of Alabama, South Carolina, and Utah as Amici Curiae in Support of Respondent at 25, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

83 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

majority in *Bowers*, it makes its only appearance in *Lawrence* seventeen years later in the dissent. In other words, history suggests that irrational slippery slope rhetoric in any given legal context (e.g., miscegenation, sodomy) will eventually lose out to the rhetoric of equality and rights that over time comes to dominate in that same context.

At the same time, however, history also suggests that *the same or very similar* sexual slippery slope rhetoric will resurface again in another legal context. While the slippery slope from miscegenation to incest and from sodomy to incest might be a relic of the past, and while the slippery slope from same-sex marriage to incest might soon be a relic of the past, history suggests that slippery slope rhetoric from *something* to incest will be in the ascendant once again—in which legal context that is, of course, it remains to be seen. The point here is that while any particular slippery slope argument might eventually die out, the sexual slippery slope itself—its basic structure, substance, and disgust-driven logic—remains an integral part of the way in which our law and culture respond to the deviant, taboo, and unfamiliar. Indeed, disgust and its linguistic vehicle, the sexual slippery slope, have a habit of returning in ways that make it more difficult to read history in strictly progressive terms.

## 2. The History of the Counterfeit Metaphor

The notion that same-sex marriage specifically, and same-sex relationships more generally, are a kind of counterfeit harkens back to a much older tradition of conceptualizing non-normative sexuality and identity in terms of numismatic fraud. With respect to the history behind homosexuality and counterfeit, scholars of language and early-modern literature have traced the contemporary phrase, “queer as counterfeit” or “queer as a three dollar bill,” back to “early sexological formulations in which homosexuality was seen as an illegitimate, or counterfeit, imitation of heterosexuality.”<sup>84</sup> They have demonstrated that early-modern texts cast sodomy—and the homosexual sodomite—and counterfeiting in interchangeable terms. As one scholar has remarked: “Sometimes, the language of counterfeiting is used to describe a sodomitical relationship; sometimes, the sodomite is actually accused of making false coins . . . In [these texts], sodomy and counterfeiting are coterminous.”<sup>85</sup>

84 Will Fisher, *Queer Money*, 66 *ENGLISH LITERARY HISTORY* 1, 14 n.5 (1999).

85 *Id.* at 5.

King Edward II, for instance, a renowned homosexual, was described by early-modern historians as a kind of counterfeiter, someone who regularly sought out young men in his court—or, in the words of one historian writing in the early seventeenth century, someone who sought “out some Piece, or Copper metal, whom by his Royal stamp he might make current.”<sup>86</sup> Around that same time, counterfeiters themselves were figured in eroticized terms. For instance, historical accounts from the early seventeenth century relate that castration was a common punishment for counterfeiters—those “false coyners” who routinely had their “privy members . . . sund[er]ed from [their] bod[ies]”—no less than it was for men who engaged in sodomy.<sup>87</sup>

Indeed, it has been suggested that the counterfeiter-sodomite connection goes as far back as Dante, who wrote the *Divina Commedia* in the early fourteenth century. In that canonical text, Dante implicitly links counterfeiters and homosexuals by, among other things, quite artfully alluding to Narcissus, a latent homosexual for medieval readers,<sup>88</sup> in the very canto where the counterfeiters are punished in hell for their fraudulent conduct.<sup>89</sup> While Dante explicitly places the homosexual sodomites alongside the usurers in a different level of hell, he nevertheless implicitly suggests that the homosexual sodomites share salient characteristics with *both* categories of sinners from the *Commedia* who engage in unnatural monetary production.

What was it, exactly, about counterfeiting and sodomy that allowed the early-modern mind to shuttle fluidly and almost effortlessly between the two? Three explanations here come to mind. First, counterfeiting and sodomy represented non-procreative monetary and sexual conduct, respectively—non-procreative conduct, moreover, that posed a serious threat to the continuity of the state. Counterfeiting was non-procreative in the sense that the coins which the counterfeiter bred were sterile because they did not naturally spawn ‘true’ money; the

86 Elizabeth Cary, *The History of the Life, Reign, and Death of Edward II*, reprinted in *The Early Modern Englishwoman: A Facsimile Library of Essential Works, Part I: Printed Writings, 1500-1640* (Betty S. Travitsky & Patrick Cullen eds., 1996) (1627).

87 William Fulbecke, *A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England* 89 (London, Wight 1601).

88 See, e.g., Marta Powell Harley, *Narcissus, Hermaphroditus, and Attis: Ovidian Lovers at the Fontaine d'Amors in Guillaume de Lorris's Roman de la Rose*, in *101 PUBLICATIONS OF THE MODERN LANGUAGE ASSOCIATION OF AMERICA* 324, 331-34 (1986).

89 Dante Alighieri, *The Divine Comedy, Inferno*, 318-23 (Charles S. Singleton trans., Princeton University Press 1970).



punishment meted out to the counterfeiters, sterilization, therefore symbolized the essence of the crime itself. Sodomy was non-procreative in the much more obvious sense that it was conduct that did not naturally spawn children; the punishment meted out to the sodomites, sterilization, therefore symbolized the essence of the crime itself.

Second, counterfeiting and sodomy were both unnatural and non-procreative *imitations* of the natural and procreative forms of monetary and sexual production, respectively. Counterfeiting was a crude imitation of the proper form of monetary production that tried to pass itself off as the real thing—monetary production which was itself, from Aristotle onward, conceptualized in biological terms. In much the same way, sodomy was a crude imitation of the proper form of sexual reproduction, an imitation that also tried to pass itself off as the real thing by virtue of the fact that it was, after all, an imitation.

Third and last, counterfeiting and sodomy both threatened to devalue the originals that each was purportedly copying. An influx of counterfeit currency into the market could compromise the worth or value of real money. Similarly, an influx of sodomy into the sexual market, so to speak, could compromise the value of the heterosexual family, "that most basic unit of the social fabric."<sup>90</sup>

If sodomy was linked to counterfeiting during the early-modern period because the former was an unnatural and sterile imitation of the real thing that tried to pass for the real thing (and devalued it in the process), then it should come as no surprise that counterfeiting terminology resurfaced in mid-nineteenth-century America in response to the threat of miscegenation. During that time, legal actors on occasion invoked the language of counterfeit when confronted with the difficulty of 'proving' one's ethnic background in court. In those cases, the 'science' of determining race—and of whether someone was 'passing' for white—was analogized to the science of determining the difference between a genuine and a fraudulent banknote.

In *State v. Jacobs*, for instance, the North Carolina Supreme Court remarked that experts on race were needed in cases where the race of a defendant was in issue, cases that involved certain crimes for which the penalties were higher if the defendant had a certain percentage of "African blood" in him—a percentage, that is, that might not be discernible based on sight alone. The *Jacobs* court observed that, just as

90 Jody Greene, "You Must Eat Men": *The Sodomitic Economy of Renaissance Patronage*, 1 *GLQ: A J. of Lesbian and Gay Stud.* 163, 166 (1994).

experts on money were needed in cases where it was disputed whether “a particular note [was] genuine or counterfeit,” so too were experts needed in cases where it was disputed whether a defendant was white (*i.e.*, “genuine”) or merely passing as white (*i.e.*, “counterfeit”).<sup>91</sup>

Similarly, in another case from around the same time, a lawyer for a black defendant on trial for allegedly raping a white woman argued to the court that the jury should not be allowed to determine the race of the defendant and the victim based on sight alone. He reasoned that, just as “in a case of passing counterfeit money” it would be impossible to determine whether “the money was counterfeit or genuine from seeing it in court,” so too would it be impossible to determine whether the victim was counterfeit (*i.e.*, merely passing for white) or genuine (*i.e.*, truly white) simply by looking at her—a determination that really mattered given that the penalties for rape were not as great if the victim were non-white.<sup>92</sup>

Counterfeiting metaphors coalesced around the miscegenation question during this time for similar reasons that counterfeiting metaphors coalesced around the sodomy question in early-modern Europe, namely, because they expressed a fear over fraudulent imitation and non-normative sexuality. Moreover, these metaphors represented a way to denote, in symbolic terms, the boundary between genuine/authentic and counterfeit/inauthentic sexuality and identity. Put most simply, the counterfeiting analogy was a catchy and convenient way to signify “difference, unnaturalness, [and] fraudulence,”<sup>93</sup> as well as, of course, a deeply-rooted cultural anxiety over passing and over the devaluation of the normative that such passing could lead to.

As this brief history of counterfeiting rhetoric in the sodomy and miscegenation contexts shows, the counterfeiting trope, no less than the sexual slippery slope, has an atavistic quality in law and culture—a habit of surfacing, that is, when law and culture are confronted with dangerous, unnatural, and potentially fraudulent imitation. When we hear that the purpose behind Ohio’s same-sex marriage amendment was to protect marriage from “counterfeits,”<sup>94</sup> that the purpose behind Arkansas’ same-sex marriage amendment was to prevent “counterfeit marriage that devalue[s] traditional marriage in the same

91 *State v. Jacobs*, 51 N.C. (6 Jones Eq.) 284 (1859).

92 *State v. Anderson*, 19 Mo. 241, 243-44 (1853).

93 Casey Charles, *Queer Writes*, 28 WOMEN’S STUD. 32, 36 (2005).

94 Cahill, *The Genuine Article*, *supra* note 11, at 418.

way counterfeit money devalues real money,"<sup>95</sup> and that the purpose behind the proposed FMA is to save marriage from "counterfeit marital unions,"<sup>96</sup> it is impossible not to read or interpret what is happening today as an instance of a very old way of thinking redux. Indeed, if anything, what was for a very long time a counterfeit *metaphor* has now become an integral part of the law itself.

#### IV. WHAT THE ATAVISTIC CHARACTER OF SUBORDINATING RHETORIC TELLS, OR AT LEAST SHOULD TELL, US

Part III surveyed some, although by no means all, of the history behind certain subordinating rhetoric in the same-sex marriage context. Part IV now returns to the present and gestures toward the future. Specifically, this Part considers how, and why, the historical approach that I have advocated here, rhetorical atavism, is a useful one for a conference that looks in general to the use of history to understand current manifestations of subordination and to craft strategies for social change, and for a panel that looks in particular at what reconstructed histories—in this case, a reconstructed rhetorical history—tell us about the current state of subordinated groups in particular substantive areas. I would like to suggest that understanding the history behind current anti-same-sex marriage rhetoric—to be sure, recognizing that this rhetoric even *has* a history—serves three interrelated ends, a descriptive end, a strategic end, and a normative end.

First, and descriptively, the atavistic character of certain subordinating rhetoric makes it that much more difficult to read history, whether it is the history of constitutional law, marriage, or sexual minorities, in strictly progressive terms. Regardless of whether the law stops conceptualizing a particular group or particular conduct in terms of slippery slopes and counterfeit, the very recurrence of those terms in rhetoric and law—indeed, the law's recurring need to conceptualize the non-normative in terms of disgust and fraud—should make us look more skeptically upon the legal narratives of unimpeded progress surveyed in Part II. As I suggested above, it's not so much a question of whether, but rather of when and against whom those same terms will be deployed in the future.

95 *Id.*

96 *Supra* note 54 and accompanying text.



In addition, and more specifically, it is not altogether clear that sexual minorities will *not* continue to be thought of as counterfeits even after the holy grail of marriage is obtained. Part II examined the narrative of progress that tells the story of sexual minorities' progressive "quest" for dignity and freedom under the law, that is, of their progressive advancement from outlaw to in-law status. As I there suggested, such a narrative is largely predicated on the assumption that marriage will mark a significant and necessary chapter in that story—indeed, perhaps even a *sufficient* chapter in that story, the moment when sexual minorities will have at last "claimed their true[st] identities"<sup>97</sup> and no longer be made to feel, in the words of one marriage equality plaintiff, like a "fraud."<sup>98</sup> At the risk of downplaying the importance of marriage, which it is not necessarily my intention to do here, I would argue that the fact that sexual minorities have been conceptualized in terms of counterfeit at different moments in time for at least seven-hundred years should force us to examine more carefully whether, *or really how*, marriage will signal the end of thinking about sexual minorities in terms of fraud and deceptive imitation. Unfortunately, that is a conversation that hasn't really taken place because of the largely unquestioned assumption that same-sex marriage will magically signal the end (or at least the penultimate stage) of discrimination against sexual minorities as a class.

Second, and strategically, the atavistic character of certain subordinating rhetoric provides a valuable opportunity for same-sex marriage advocates to demonstrate the extent to which law and history have *not* necessarily progressed over time. Rhetorical atavism assumes that, at least some of the time, the 'bad' rhetoric or the "bad parts of the past," far from being 'transformed into' or 'covered over by' something that sounds more innocuous and politically palatable, is still very much alive and well today. It assumes that, while sometimes we might have to dig deep, so to speak, to establish a connection between the rhetorical present and a 'transformed' or 'sedimented' rhetorical past, at other times the connection between the rhetorical present and rhetorical past is quite transparent—sometimes, in fact, the rhetorical present is

97 *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 730 (2006) (Parrilli, J., concurring), review granted and opinion superseded by *In re Marriage Cases*, 53 Cal. Rptr. 317 (2006).

98 Aff. of Cindy Meneghin, dated September 21, 2003, P 13, *Lewis v. Harris*, 2003 WL 23191114 (N.J. Sup. Ct. 2003) (No. MER-L-15-03). ("We work hard enough to be good parents, good employees, and good tax-paying citizens, and we should not have the extra work of explaining ourselves all the time, as if we are unworthy and as if our family is a fraud").

a case of our rhetorical past redux. This transparency, in turn, has certain strategic advantages. Challenging the constitutionality of a same-sex marriage amendment, the purported aim of which is to prohibit counterfeits and marriage approximations, becomes that much easier once we situate it within a much larger and much longer tradition of conceptualizing non-normative conduct and relationships—sodomy, miscegenation—in terms of counterfeit and deceptive imitation.

Third, and more normatively, the atavistic character of certain subordinating rhetoric should signal a word of caution to marriage advocates with respect to the ways in which such rhetoric might curiously be surfacing in their own progressive arguments. If, as I have suggested, the disgust-driven rhetoric of the slippery slope and the fraud-driven rhetoric of the counterfeit will inevitably resurface in time in other contexts, then there is no reason to believe that it will only resurface in conservative arguments and never appear in progressive ones. That 'bad' rhetoric, or traditionally conservative (and even reactionary) styles of legal argument, can (and perhaps inevitably will) be appropriated by progressives to serve progressive goals and ends is not a novel idea. Professor Dan Kahan, for instance, has pointed to the ways in which the conservative idiom of disgust has at times been "appropriated" by liberals to serve a "progressive" agenda.<sup>99</sup> Similarly, Professor Jack Balkin has reminded us that "styles of legal argument . . . do not have a fixed normative or political valence."<sup>100</sup> Rather, "[t]heir valence varies over time as they are applied and understood repeatedly in new contexts and situations."<sup>101</sup>

Balkin refers to this phenomenon as "ideological drift," and cites numerous examples in the law where certain ideologies and "styles of legal argument" have drifted from conservative camps over to progressive camps, and vice versa.<sup>102</sup> What I would like to suggest here is that rhetorical atavism and ideological drift might together explain why marriage progressives have recently appropriated their own version of the slippery slope to incest and other sexual taboos. Traditionally the darling of reactionary discourse, the slippery slope, as I have suggested above, has of late reappeared or resurfaced in *a* form in progressive

99 Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *THE PASSIONS OF LAW* 63 (Susan A. Bandes, ed., 1999).

100 J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 *CONN. L. REV.* 869, 870 (1993).

101 *Id.*

102 *Id.* at 870-71.

marriage discourse, namely, in the claim that gays and lesbians should be allowed to marry a person of their choice because all sorts of unsavory folks—pedophiles, murderers, sex offenders, and even welfare recipients among them—already can.<sup>103</sup> I have elsewhere argued that such a claim, which has appeared widely in progressive marriage discourse, mimics the slippery slope in a number of substantive and structural ways.<sup>104</sup> If I am correct, then the ‘even sex offenders can do it’ claim could very well be an instance of rhetorical atavism and ideological drift working hand-in-hand—something which marriage progressives should take seriously if they are truly committed to legal progress above and beyond the quest for same-sex marriage.

#### V. CONCLUSION

My aim in this paper has been threefold. First, to demonstrate that what might at first blush appear to be ‘mere’ rhetoric in the debate over marriage equality has played a critical role in driving the law in this area. Second, to demonstrate that this rhetoric has a history, and in some instances a very long history, in the legal regulation and cultural prohibition of sodomy and miscegenation. And third, and most important here, to suggest that the history behind contemporary anti-gay rhetoric, as well as the atavistic character of that rhetoric, should force us not only to look more skeptically upon the narratives, or myths, of uninterrupted progress that elsewhere emerge from marriage equality discourse, but also to adopt a more critical stance vis-à-vis at least two things: (1) the kinds of arguments that marriage advocates are making in the struggle for marriage equality (*i.e.*, to what extent might those arguments be perpetuating the same rhetoric of fraud/counterfeit and disgust/slippery slopes that has traditionally been deployed against sexual minorities and other subordinated groups?); and (2) the capacity of marriage to signal the end of discrimination against sexual minorities (*i.e.*, precisely how will marriage signal the magical end of discrimination against sexual minorities when discrimination against

103 See, e.g., Brief and Argument of Appellant – Regina Pavone at 31, *In re Estate of Hall* 707 N.E.2d 201 (Ill. App. Ct. 1998 (No. 97-4654)) (arguing that the claim that gays and lesbians make bad parents doesn’t “hold water” because “[a]lcoholics, drug addicts and those on welfare are . . . given the right to marry and bring children into this world although, both financially and emotionally, they are ill-equipped to raise the children they conceive in a manner consistent with traditional values and morals”).

104 Cahill, *supra* note 11, *passim*.



that class, or at least the rich expressive idiom of discrimination, has an episodic quality that suggests that it is not going away any time soon?).

I would like to conclude by noting that my intention here has not been to suggest that legal progress is itself a myth—surely one cannot deny that the move from *Bowers* to *Lawrence* represented progress for sexual minorities in a very real sense. Rather, it has been to suggest that the legal struggle for marriage equality has been largely structured around a narrative (or series of narratives) of uninterrupted progress, and that that narrative not only has taken on a mythic or legendary quality, but also fails to provide a fully accurate account of the way in which the forms of subordination, or at least the language of subordination, have recurred in similar ways throughout history. However alluring, the myth of progress might lull us into overlooking the most obvious traces of the bad parts of the past in the present. Worse yet, the myth of progress might even render actors with so-called good intentions and progressive goals—in this case, marriage equality—blind to the way in which *they* are repeating the bad parts of the past by forgetting them.